Supreme Court, U.S.
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85-1127

No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1985

JERRY L. KING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. When a trial court refuses to either grant an adjournment of the commencement of trial, or take other affirmative action, in order to compel the presence at trial of a favorable defense witness, does this not involve the Sixth Amendment right to compulsory process, requiring some compelling governmental interest to sustain such inaction?

2. Similarly, does the accused have the right to disclosure of the transcript of exculpatory grand jury testimony?

3. Did the Court of Appeals apply the wrong standard of review when it treated both issues merely as matters within the discretion of the trial court, to be disturbed only if there was an abuse of discretion?

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JERRY L. KING,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Jerry L. King, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this proceeding on May 20, 1985, affirming the Petitioner's conviction.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, reported at 762 F.2d 232, is printed as Appendix "A."

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1985, and the petition for rehearing, and hearing *in banc* was denied September 10, 1985. The jurisdiction of this Court is invoked under 28 USC §1254(1).

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

PRELIMINARY STATEMENT

Petitioner was charged in an indictment filed April 26, 1984 in the Western District of New York. The four counts of the indictment charged, respectively, conspiracy to deal in and utter counterfeit money in violation of 18 U.S.C. §§472 and 473, the transfer of counterfeit money, in violation of 18 U.S.C. §473, on two separate occasions, and "misleading a witness" in violation of 18 U.S.C. §1512.

On May 11, 1984, the Petitioner appeared for arraignment and entered a plea of not guilty and was released on his own recognizance. After jury selection, commencement of trial was scheduled for October 1, 1984.

On September 27, 1984, Petitioner moved for adjournment of the commencement of trial to allow for additional defense preparation and to provide the defendant with the opportunity to obtain the presence of Dennis King, a federal prisoner, for trial. The

defendant also moved for disclosure of the Grand Jury testimony of Dennis King. These motions were finally denied by the Trial Court on October 1, 1984, at which time the trial began.

The jury returned a verdict of guilty on counts one and four of the indictment and not guilty on counts two and three of the indictment.

In an order filed on November 19, 1984, the Trial Court granted the defendant's motion to set aside the verdict with respect to count four of the indictment, which order was the subject of the government's unsuccessful cross appeal below, Docket 84-1437.

On November 19, 1984, Petitioner was sentenced to one year and one day in prison. The execution of the sentence pending review was stayed by the District Court.

STATEMENT OF FACTS

The single count upon which Petitioner stands convicted rests entirely upon the testimony of an alleged co-conspirator. It was to defend against the allegations in this count that Petitioner sought the presence as a witness of another named co-conspirator, and a copy of that witness' exculpatory grand jury testimony. It is the denial of these efforts to compel the production of favorable evidence which is raised in this petition.

On July 11, 1983, a meeting occurred in Syracuse between Dennis King, Petitioner's brother who lived in Pennsylvania, John Murphy Gassett and his cousin, Richard Hilditch, both residents of Massachusetts (1-80; 4-13-19).[1] At this meeting, Dennis King purchased $27,000.00 in counterfeit Federal Reserve Notes

[1] Hyphenated numerals refer to the volume and page of the transcript of trial proceedings contained in the record. The parenthetical signal (A-) refers to pages in the joint appendix filed with the Court below.

for $5,000.00 in legal currency. In his own testimony, Petitioner admitted having driven to Syracuse to deliver $5,000.00 to his brother, but denied having any knowledge that the money was intended for use in the purchase or transfer of counterfeit funds. In Syracuse Petitioner met and had dinner with his brother, by whom he was later introduced to John Murphy Gassett and Richard Hilditch (4-15-18). After a brief conversation with these individuals, which did not relate to counterfeit money, Petitioner returned to Buffalo.

John Murphy Gassett had, in March of 1984, pled guilty to a charge of transportation of counterfeit currency and was later placed on probation (1-78). He testified for the government that in Syracuse Petitioner was present for the entire meeting and was aware of and participated in the transfer of $27,000.00 in counterfeit currency (1-85-94). Richard Hilditch was not called by the government as a witness.

The defendant's brother, Dennis King, though called as a witness before the Grand Jury on March 22, 1984, was not contemplated as a trial witness by the government. At the time of the trial Dennis King was in a federal penitentiary in Pennsylvania. In a letter dated May 15, 1984, the Assistant U.S. Attorney notified Petitioner's counsel that "Dennis King testified that he had no knowledge as to the knowing participation of the defendant in acquiring, possessing or distributing counterfeit money." Further, the Assistant U.S. Attorney, on August 1, 1984, orally provided further information regarding the exculpatory nature of Dennis King's grand jury testimony. The defense made a specific request to the government for a copy of the grand jury testimony of Dennis King; the government refused disclosure.

On September 27, only four days after release of Petitioner from a federal halfway house, the District Court heard two defense motions, first a motion for adjournment of the commencement of trial from October 1 (A-52). The motion for adjourn-

ment was primarily based upon the need for time to procure the presence of Dennis King, at this time a federal prisoner, for use as a witness by the defense at trial (A-52-55).

Defense counsel had been advised by the U.S. Marshall Service that up to two weeks and a posting of $3,000.00 security would be required for the production of the witness by the Marshall Service; Petitioner was willing to pay this exorbitant amount (A-54) assuming, apparently, that this was the only means available to produce the witness.

The second motion by the defense was a request for the grand jury testimony of Dennis King (A-56-62). The Trial Judge reserved decision on the questions concerning the procurement of Dennis King as a witness and the disclosure of his grand jury testimony to the defense and undertook a review of that testimony. Later Judge Elfvin advised both counsel that the trial would go forward as scheduled but took no action to help secure the attendance of the witness, Dennis King. (A-70).

On the date scheduled for trial, October 1, 1984, the District Court again took up these questions at the instance of defense counsel. The judge observed that the May 15 letter from the Assistant U.S. Attorney "might have been a little stronger" in its advice concerning the exculpatory nature of Dennis King's testimony. The judge noted:

> In Mr. Dennis King's testimony, as I read it, he indicates fairly much that according to his understanding, his brother Jerry did not know about the counterfeit nature or the counterfeit money. (A-69-70)

The Trial Court later observed:

> And very clearly indicating that Jerry King at that time had no knowledge of the particular matter that the $5,000.00 was needed for, was present at a time when a bag of impliedly what contained the money was handed over to Dennis King, but very clearly indicated that Jerry King just left

> the situation, had no sighting of any money or no conversation or anything about any counterfeit money. (A-75)
>
> * * *
>
> Dennis King said he had arranged for Jerry King to come to Syracuse to give Dennis King the $5,000.00, which Jerry King from time to time had done. Nothing was said to Jerry King about why this was needed . . . . and Jerry King went there and gave him the money and was present when a bag was handed over, and Jerry King left immediately before anything was exposed to what was in the bag. That's what Dennis King said. (A-89)

Defense counsel stated the need for the grand jury testimony, first in order to effectively cross-examine government witnesses:

> In other words, if the gist of the testimony is exculpatory, there is a very good chance that by my looking at it with what I know of this case and I know of my client's position, could reasonably supply us . . . with substantial leads from which I could extract evidence to help us in this case. (A-80)

Second, possession of the grand jury testimony of Dennis King would be necessary in order to effectively interview him and make, eventually, the determination of how to best present the witness on the stand (A-83). As noted by defense counsel, "Dennis King has a very lengthy record. He knows what the inside of jails look like. He's a convicted counterfeiter, thief, bank robber, and so forth." Therefore, what he might tell defense counsel, not armed with a grand jury transcript, might be tailored to avoid being called as a witness, or so exaggerated in favor of the accused as to make him subject to devastating impeachment.

The prosecution's resistance to disclosure of the grand jury testimony was not founded upon the interests usually associated with the secrecy of grand jury proceedings, but rather explicitly upon the preservation of strategic advantage. As outlined by the Assistant U.S. Attorney, he believed that Dennis King's grand

jury testimony, though clearly exculpatory to the defendant, was untrue. "[B]eing provided with a copy of the grand jury testimony would help him coach or continue the fabrication of his testimony should he testify at the trial" (A-60). The government further expressed the concern that disclosure of the grand jury testimony would diminish its value as an impeachment tool should Dennis King take the stand (A-62).

The Trial Court denied the motion for an adjournment. The Court failed to suggest or initiate any other procedures available to procure the presence of Dennis King as a witness at trial. The Trial Court gave no reason for its inaction other than that there was an opportunity previously to obtain Dennis King's presence had the defense acted sooner (A-70, 79, 86).

Similarly, opining that "You can't make any use of the testimony in the grand jury, per se," the court declined to order the prosecutor to surrender the grand jury testimony (A-86).

During deliberations, the jury asked numerous questions evincing concern about the "voids" in the proof (5-58, 66). Having deliberated since shortly before noon on October 5, 1984 until 9:55 p.m., the jury announced that "we are deadlocked and any further deliberation would be fruitless." (5-80). The Trial Court sent the jury home for a long weekend to return on October 9 (A-92).

On October 9, after being given a "modified Allen charge" the jury deliberated for a short period of time, perhaps an hour, and delivered a note to the court which stated "We the jury have reached a reasonable decision on all counts." (A-106).

That verdict included acquittals on counts two and three of the indictment which alleged transfers in Buffalo of counterfeit currency. The verdict on count four was set aside by the District

Court in an order dated November 19, 1984 (A-114), which the government unsuccessfully appealed below.

However, the jury convicted under count one of the indictment, alleging the conspiracy associated with the transfer of counterfeit currency at the meeting in Syracuse. The District Court imposed a sentence of a term of imprisonment of one year and one day.

The Circuit Court suggested that "no reason was offered for not having moved earlier to have Dennis brought to trial . . . King did not ask the court to have Dennis produced on an *expedited* basis." (emphasis added) Although the motion was brought in the week prior to the scheduled trial, the Second Circuit viewed the timing as being "two court-days before trial."

The Court of Appeals refused to view the issue of compelling the presence of Dennis King as one involving the Sixth Amendment right to compulsory process to obtain witnesses favorable to the accused.

> That King made neither a timely request for Dennis' production nor an eleventh hour request for his production *on an expedited basis* belies his claim that his fundamental rights were violated.

Although disapproving the government's stated reason for opposing the disclosure to the accused of the transcript of Dennis' exculpatory grand jury testimony, i.e. that the government believed that the prior testimony was perjurious, the Court of Appeals, referring to its prior decision in *United States v. Natale,* 526 F.2d 1160, 1171 (2d Cir. 1975), cert. den. 425 U.S. 950 (1976) decided that approving the suppression of that evidence was not an "abuse of discretion." The lower court did not directly address Petitioner's claim that failure to provide the transcript of the exculpatory testimony violated the fundamental Sixth

Amendment rights to discovery of favorable evidence, the effective assistance of counsel, and the right to due process of law.

REASONS FOR GRANTING THE WRIT

POINT I

THE RIGHT OF A CITIZEN TO PRESENT A DEFENSE MUST, AFTER ALL, BE PRESERVED.

The criticism of the exclusionary rule, that it deprives the fact-finder of relevant evidence (of guilt) underscores both the correctness of and the need for enforcing the right of accused citizens to present evidence of innocence. The "correctness" flows from the logic of requiring an "overall fair balance of advantage with the prosecution with respect to the presentation of witnesses." Westen, the Compulsory Process Clause, 73 Michigan L. Rev. 71, 121 (1974). The "need" for vigilance in the enforcement of this right is correlative to the increase of trials and the increasing scope of proof which may result from restrictions on the application of the exclusionary rule.

This Court has recognized that the Sixth Amendment encompasses the right to present a defense.

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies . . . [an accused] has the right to present his own witnesses to establish a defense.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923 (1967). Petitioner was not only denied his right to present a defense but in a way which will surely erode this right for others in the Second Circuit.

Only four days after his release from a federal halfway house, and in the week prior to his scheduled trial, Petitioner appeared seeking the assistance of the Western New York District Court in procuring the presence of a witness who was confined in a federal prison in Pennsylvania and who previously gave exculpatory testimony to the grand jury. Appellant's good faith was demonstrated by his willingness to pay the exorbitant amount requested by the Marshall's Service for the production of the witness. Although the Circuit Court panel treated the request for an order directing an adjournment as the equivalent of a request for an order directing that Dennis King be brought to trial[2] the opinion stated that "King did not ask the Court to have Dennis produced on an *expedited basis.*" (emphasis added).

Petitioner came to the District Court seeking production of the exculpatory witness by any means, and merely specified one means that would be adequate to that end — an adjournment. See *Singleton v. Lefkowitz,* 583 F.2d 618 (2d Cir. 1978), *cert. den. sub nom Abrams v. Singleton,* 440 U.S. 929, 99 S.Ct. 1266, 59 L.Ed.2d 486 (1979).

Though there may be a constitutionally tolerable preference of one means over another in seeking the protection of fundamental constitutional rights, see, Westen and Mandell, To Talk, to Balk or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response," 19 Am.Crim.L.Rev. 521 (1982), the establishment of such a preference ought to be on the basis of some manifest government interest and without impairing the interests safeguarded by the underlying constitutional claim. *Id.,* at 526. Establishing a request for the production of a witness on a so-called "expedited basis" as the exclusive means of enforcing the

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[2] . . . no reason was offered for King's not having moved earlier to have Dennis brought to trial . . . . the Court denied the motion for an adjournment. (Slip op. at 3942.)

Sixth Amendment right when "ordinary" means are not expected to produce the witness prior to a scheduled trial, as does the Circuit Court, is utterly contrived.

The ruling of that court suggests that the fundamental right to compulsory process will only be recognized if there is *no* articulable reason in opposition. This is an embarrassment to the constitutional promise of a fair trial. Here evidence relevant to innocence as has been excluded merely because "the *defendant* has blundered" in failing to assert his right at a time when no inconvenience would have been encountered in granting the relief needed. If the imperative of the "criminal justice system's truth-finding function," *United States v. Leon,* 468 U.S. ____, 104 S.Ct. ____, 82 L.Ed.2d 677, 688 (1984) is sufficiently strong to require the admission of evidence seized without probable cause, *a fortiori* it compels the admission of evidence of innocence as to which no argument better than that of inconvenience can be recited.

If we are concerned that "some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains," *Id.,* as a result of the exclusion of evidence of *guilt,* should there not be more concern that some innocent defendant may be convicted or lose an appropriately favorable plea bargain opportunity by the exclusion of *evidence of innocence?* The ineluctable answer to these questions is nevertheless avoided by the Court of Appeals for the Second Circuit in its holding which eviscerates, for this Circuit, the fundamental right of the accused to compel the attendance of witnesses in his favor. The ruling is not only without support in logic or law but is inconsistent with rulings in other Circuits giving reasonable scope to this fundamental right.

POINT II

STINGY ENFORCEMENT OF THE RIGHT TO DISCOVER FAVORABLE EVIDENCE, AS IN THIS CASE, INJURES A VARIETY OF FUNDAMENTAL INTERESTS; A CLEAR RULE MUST BE ESTABLISHED.

The roots of the right of an accused citizen to discover favorable evidence which exists in the Sixth Amendment compulsory process clause, *United States v. Augenblick,* 393 U.S. 348, 356 (1969); *United States v. Nixon,* 418 U.S. 683 (1974); Westen, the Compulsory Process Clause, 73 Mich.L.Rev. 71, 122 (1974), are illuminated in this case where such discovery is the *sine qua non* to *use* of the favorable evidence to which the Sixth Amendment entitled the accused.

Although the government disclosed the nature of the favorable evidence, without the exculpatory grand jury transcript itself the accused was seriously impaired in the ability to actually obtain the testimony of the witness and to present his defense. The accused citizen should not have to depend upon the good faith of the prosecutor's translation of the contents of exculpatory documents; indeed the district court found substantial fault with the actual information provided by the government regarding the contents of the grand jury transcript. The difference, to reasonably skilled counsel, between having what the government *says* is favorable about the grand jury testimony, on the one hand, and actually having the transcript to use in interviewing the witness and during his testimony and in cross examining other witnesses, on the other hand, is extremely great.

Primarily a review of that testimony would be useful to determine whether it was reasonable to expend the time and resources necessary to interview the witness, an inmate in a federal prison in an adjoining state. If that effort is undertaken, access to the

grand jury testimony would be a useful tool in interviewing the witness if he proved reluctant, evasive, or exaggerated, or attempted to give unfavorable information in order to avoid being called. If the testimony disputed major claims by the sole prosecution witness, then it is reasonable to suspect that it would provide the basis to challenge points of apparently less importance but of the type upon which jurors often would rely in evaluating the credibility of witnesses or the weight to be attributed to their testimony.

It is of no use to suggest, as did the trial court, that one "can't make any use of the testimony in the grand jury, per se" (A-79). If Dennis King were, at the time, unavailable for any of the reasons enumerated under F.R.E. 804(a) then his grand jury testimony would be admissable under 804(b)(1). It is possible in this case that three out of the five described conditions of "unavailability" in 804(A) could have obtained: given the posture of the prosecution regarding the nature of his prior testimony, Dennis King may have elected to assert a privilege or refuse to testify. Nor is it beyond the realm of possibility that the defense could have taken action to procure the presence of Dennis King sufficient to satisfy the precondition to unavailability in 804(a)(5).

On the other hand, were Dennis King present at trial and his testimony inconsistent with his grand jury testimony then that testimony would be admissible not only to impeach him as a witness, FRE 801(d)(1)(A), but also as substantive evidence of the information it contains. *Welcome v. Vincent,* 549 F.2d 853 (2d Cir., 1977); *U.S. v. Lee,* 540 F.2d 1205 (4th Cir., 1976).

Indeed, in *Welcome v. Vincent* the Second Circuit determined that the exclusion of an extrajudicial statement of a witness which inculpated the witness and exonerated the accused was fundamental error so long as the statement had "some semblance of reliability" 549 F.2d at 859. This very nearly states the stand-

ard for the admissibility of favorable evidence which Professor Westen derives from the Sixth Amendment cases:

> There is only one point at which the jury should not be allowed to consider the evidence — where the evidence is so inherently unreliable that it cannot rationally be evaluated . . . . A defendant has a right to introduce material evidence in his favor whatever its character, unless the state can demonstrate that the jury is incapable of determining its weight and credibility and that the only way to insure the integrity of the trial is to exclude the evidence altogether.

Westen, supra n.2, 73 Mich.L.Rev. at 159.

Under this rationale, Dennis King's grand jury testimony should be admissible without regard to his availability at trial.

Had Dennis King testified at trial, the statement, if consistent with his testimony could, under certain circumstances be used for its substance. Cf. F.R.E. 801(d)(1)(B). Additionally, such testimony could be utilized to refresh the recollection of a witness, a purpose for which the disclosure of the grand jury testimony is required. *United States v. Proctor & Gamble,* 356 U.S. 677 (1958).

It is undeniable that the undisclosed grand jury testimony may well have been useful in other ways, as defense counsel suggested to the Trial Court. It is equally undeniable that the nondisclosure of the testimony impaired the ability of the Petitioner and his counsel to effectively present a defense. More important, here the Circuit Court recognized that there was no valid governmental interest in opposing disclosure, and disapproved the one reason given by the Assistant U.S. Attorney, i.e. that the grand jury testimony of Dennis King was disbelieved.

CONCLUSION

Can the constable supress favorable evidence because the defendant has blundered?

The mere inexactitude of the Petitioner's request to the district court for assistance in the production of an exculpatory witness, or the mere inconvenience of satisfying such a request, cannot be allowed as justification for the denial of the fundamental right to compulsory process. The only thing that can be said in favor of this segment of the Court of Appeal's ruling is that there was an articulable reason, however uncompelling, to deny the relief. By contrast, both courts below disapproved of the only interest advanced by the government to support suppression of the exculpatory grand jury transcript.

The ruling below reflects intolerably whimsical enforcement of these fundamental rights which are so essential to our shared concept of fairness in the adjudication of citizens' criminal responsibility. The enforcement of these fundamental rights cannot be left solely to the discretion of Trial Courts.

For all the above reasons, it is respectfully requested that the writ of certiorari be granted.

Respectfully submitted,

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December 18, 1985

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of September one thousand nine hundred and eighty-five.

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Cross-Appellant,

v.

JERRY L. KING,

Defendant-Appellant, Cross-Appellee.

NO. 84-1409 / 84-1437

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Jerry L. King,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

Is is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

United States Court of Appeals
Second Circuit
Filed Sep 10 1985

Elaine B. Goldsmith
Clerk

by Gayle M. McDowell
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 977, 1188 — August Term, 1984

(Argued: April, 11, 1985 Decided: May 20, 1985)

Docket Nos. 84-1409, -1437

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross-Appellant,

—v.—

JERRY L. KING,

Defendant-Appellant-Cross-Appellee.

Before:

MANSFIELD, KEARSE, and PRATT, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Western District of New York, after a jury trial before John T. Elfvin, *Judge*, convicting defendant of conspiracy to possess and distribute counterfeit money, in violation of 18 U.S.C. § 371; cross-appeal by the United States from an order, 597 F. Supp. 1228 (1984), vacating the jury's verdict finding defendant guilty of tampering with a witness, in violation of 18 U.S.C. § 1512.

Affirmed.

RODNEY O. PERSONIUS, Assistant United States Attorney, Buffalo, New York (Salvatore R. Martoche, United States Attorney for the Western District of New York, Buffalo, New York, on the brief), *for Plaintiff-Appellee-Cross-Appellant.*

MARK J. MAHONEY, Buffalo, New York (Diebold, Bermingham, Gorman, Brown & Cook, P.C., Buffalo, New York, on the brief), *for Defendant-Appellant-Cross-Appellee.*

KEARSE, *Circuit Judge:*

Defendant Jerry L. King appeals from a judgment of the United States District Court for the Western District of New York, entered after a jury trial before John T. Elfvin, *Judge*, in Buffalo, New York, convicting him of conspiring to possess and distribute counterfeit money in violation of 18 U.S.C. § 371 (1982). King contends that he should be granted a new trial because the district court erroneously denied him the right to review the transcript of certain testimony before the grand jury that indicted him and improperly refused to grant a continuance to permit him to bring a favorable witness to the trial. The government cross-appeals, challenging an order of Judge Elfvin that vacated the jury's verdict against King on a charge of tampering with a witness in violation of 18 U.S.C. § 1512 (1982) on the ground that the facts proven by the government were not within the scope of § 1512. For the reasons below, we affirm the judgment and order of the district court.

I. Background

King was charged in an April 1984 indictment on one count of conspiring to deal in and utter counterfeit money, in violation of 18 U.S.C. § 371; two counts of transferring counterfeit money, in violation of 18 U.S.C. 473 (1982); and one count of misleading a witness, in violation of 18 U.S.C. § 1512. On July 23, 1984, jury selection was scheduled for August 28, 1984, and thereafter commencement of trial was scheduled for October 1, 1984.

During the course of the investigation of the events that led to the indictment, King's brother, Dennis King ("Dennis"), had appeared as a witness before the grand jury and testified that King was not a knowing participant in the counterfeit currency transactions. After King was indicted, the substance of Dennis's exculpatory testimony was communicated by the Assistant United States Attorney to King's attorney on two occasions: first to King's original attorney in May 1984, four days after King's arraignment, and then to King's newly substituted trial counsel on August 1, 1984. By the time of King's trial, Dennis was incarcerated in federal prison at Lewisburg, Pennsylvania.

On September 27, 1984, two court-days before the scheduled start of trial, King moved for the disclosure of Dennis's grand jury testimony and for a two or three week adjournment of the trial date. King's counsel stated that he wanted to review Dennis's grand jury testimony because he had been informed by Dennis's attorney that that testimony was exculpatory of King. The government pointed out that King's attorneys had previously been advised by the government of the exculpatory nature of Dennis's testimony, and it opposed King's motion for

production of the grand jury transcript on the ground that it believed that Dennis's testimony had been perjurious and it did not wish to facilitate the continuation of his fabrications. The district court reviewed Dennis's grand jury testimony *in camera*, informed King that Dennis had testified that King was not a knowing participant in the counterfeit currency transactions, noted that Dennis had long been available to King for purposes of consultation, and denied the motion for production of the grand jury transcript.

The grounds advanced for King's requested adjournment were (1) that King had become aware of certain "new leads" that might lead to exculpatory evidence, and (2) that King wanted his brother, Dennis, "to be present or at least available at trial." The U.S. Marshals Office had advised King that it would require approximately two weeks' notice to obtain approval for Dennis to be brought from Lewisburg to the trial in Buffalo. The court was unpersuaded by King's proffered reason for not having discovered his new leads earlier, and no reason was offered for King's not having moved earlier to have Dennis brought to trial. King's counsel admitted that Dennis had not been unavailable for consultation. The court denied the motion for an adjournment. King did not ask the court to have Dennis produced on an expedited basis.

At trial, the jury found King guilty on the conspiracy count and the witness tampering count, and acquitted him on the two counts charging him with transfers of counterfeit money. Judge Elfvin vacated the guilty verdict on the witness tampering count, finding that the facts proven by the government, which we discuss in Part II.B. below, did not bring King's actions within § 1512. King

was sentenced to imprisonment for one year and one day on the conspiracy count. This appeal and the cross-appeal followed.

II. Discussion

A. *The Appeal*

King contends that the district court abused its discretion in denying his motion for a continuance to permit Dennis to be brought to testify and in refusing to grant him access to the grand jury transcript. We find no merit in these contentions.

A motion for an adjournment of the scheduled start of trial is addressed to the sound discretion of the trial judge. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964); *Avery* v. *Alabama*, 308 U.S. 444, 450 (1940); *United States* v. *Cicale*, 691 F.2d 95, 106 (2d Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983). To show abuse of that discretion, the defendant must demonstrate that the court's denial of a continuance was arbitrary and substantially impaired his defense. *United States* v. *Bein*, 728 F.2d 107, 114 (2d Cir.), *cert. denied*, 105 S. Ct. 135 (1984); *United States* v. *Ellenbogen*, 365 F.2d 982, 985 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967).

Here we can hardly regard the district court's action as arbitrary, and we conclude that any detriment suffered by King resulted form his own dilatory conduct and not from the court's ruling. King was advised more than four months in advance of trial that his brother's grand jury testimony had sought to exonerate him in the counterfeit money transactions. Yet he waited until two court-days before trial to suggest to the district court that he wanted Dennis to appear as a trial witness. Such

tactics provide no basis for a ruling that the district court abused its discretion in denying a continuance to permit the witness to be brought to trial.

We are unpersuaded by King's attempt to cast this issue as a violation of his Sixth Amendment right to compulsory process to obtain witnesses in his defense. There seems to be no doubt that King would have been able to secure Dennis's presence had he simply requested it in timely fashion. Further, it is possible that had King requested, even at the late date of his continuance motion, that the court expedite the production of Dennis so that he might appear in time for trial. Dennis's presence might have been procured. That King made neither a timely request for Dennis's production nor an eleventh hour request for his production on an expedited basis belies his claim that his fundamental rights were violated.

Nor do we find merit in the claim that King should have been given the transcript of Dennis's grand jury testimony. We pause to note that we are unimpressed with the government's stated reason for opposing the motion, *i.e.*, that the government did not want Dennis to have access to the transcript because it believed his prior testimony had been perjurious. Incredulity is not a proper basis for denial of access to grand jury materials.

Nonetheless, the court's ruling was not inappropriate. King had been advised in May and August that Dennis's testimony was exculpatory of King, and King's counsel conceded that Dennis would have been available for consultation if counsel had wished to speak with him. Thus, this was not a case in which King lacked either information as to the contents of the transcript or access to the

person who gave the testimony. The district court's denial of the motion for production of the transcript was therefore not an abuse of discretion. *See United States* v. *Natale*, 526 F.2d 1160, 1171 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976) (denial of grand jury testimony upheld where witness had been continually available for interviewing).

B. *The Cross-Appeal*

Count 4 of the indictment charged that from approximately July 26, 1983, through August 4, 1983, King had, in violation of 18 U.S.C. § 1512, "knowingly engage[d] in misleading conduct toward another person" by making false statements to, and intentionally concealing material facts from, one Frank S. Orgovan, Jr., for the purpose of hindering and preventing the disclosure to law enforcement agents of King's participation in the counterfeiting offenses. The jury found King guilty on this count, but the trial court vacated the verdict on the ground that the facts proven did not amount to a violation of § 1512. The government cross-appeals from this decision. We agree with the district court's interpretation.

Section 1512 provides, in pertinent part, as follows:

> (a) *Whoever knowingly* uses intimidation or physical force, or threatens another person, or attempts to do so, or *engages in misleading conduct toward another person*, with intent to—
>
> (1) influence the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to—
>
> (A) withhold testimony . . . from an official proceeding; [or]
>
> . . . .

> (3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense
>
> . . .
>
> shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

(Emphasis added.) The evidence on count 4, viewed in the light most favorable to the government, painted the following picture. Orgovan was an employee of King. In mid-June 1983, King informed Orgovan that he could obtain counterfeit money and that he would contact Orgovan after making a trip to Syracuse, New York. On July 16, five days after a meeting in Syracuse at which King paid $5,000 for $30,000 in counterfeit money, he met again with Orgovan in Buffalo and gave Orgovan five counterfeit $20 federal reserve notes, describing the quality as "good" and stating that he had passed some of the notes in a local shopping mall. On July 17, King gave Orgovan $2,700 in counterfeit currency in a white bag that was eventually recovered by law enforcement agents; King's fingerprint was found inside the bag. In supplying the counterfeit $2,700 to Orgovan, King cautioned that Orgovan should not identify King as the source of the counterfeit money.

In late July 1983, Orgovan and Dennis were arrested and charged with counterfeiting-related offenses. While Orgovan was still in custody, he telephoned his girl friend, Gale Hewson, and told her to contact King immediately. Hewson testified that she did so and that King's response was to tell her to destroy or get rid of the money in any way she could.

Orgovan eventually agreed to cooperate with the government and implicated King in the counterfeit currency transactions. He met with King on August 2 and August 4, wearing a recording device. The essence of these meetings was King's solicitation of Orgovan's cooperation in concealing King's complicity in the counterfeit currency transfers. King repeatedly observed that he and Orgovan could trust only each other; King gave assurances that if Orgovan remained silent, his silence would be financially rewarded; and King urged that if Orgovan had to implicate someone, he should implicate King's brother, Dennis, who had already been implicated by others. King advised that if Hewson were asked, she should say she knew nothing about the counterfeit money.

In an order reported at 597 F. Supp. 1228 (1984), Judge Elfvin vacated the jury's verdict finding King guilty of a violation of § 1512 because the evidence did not indicate that King had misled Orgovan in any way. Rather, "King, simply and flat-out, tried to persuade Orgovan to lie" to mislead the government. *Id.* at 1231. The court ruled that although the conduct actually proven might amount to an obstruction of justice in violation of 18 U.S.C. § 1503 (1982), it was not within the ambit of § 1512. This interpretation of § 1512 is supported both by the language of the statute and by its legislative history.

By its terms, § 1512 does not purport to reach all forms of tampering with a witness, but only tampering by specified means, *i.e.*, by use or attempted use of "intimidation" or "physical force" or "threat[ ]" or by engaging in "misleading conduct toward another person." The indictment charged that King had engaged in misleading conduct toward Orgovan, but the evidence did not support

that charge. The proof was plain that Orgovan was involved in the scheme as early as mid-June; he knowingly received counterfeit money from King on two occasions; he had discussions with King as to the counterfeit nature of the bills; and when he was arrested, he sent word to King of that fact. No rational juror could conclude from the August 2 and 4 conversations—in which King urged Orgovan that the two should stick together, that Orgovan should not implicate King but only Dennis, and that Orgovan's silence would be rewarded financially—that Orgovan was in any way misled. Since the only allegation in the indictment as to the means by which King induced Orgovan to withhold testimony was that King misled Orgovan, and since the evidence failed totally to support any inference that Orgovan was, or even could have been, misled, the conduct proven by the government was not within the terms of § 1512. *See United States* v. *Lester*, 749 F.2d 1288, 1293-95 (9th Cir. 1984); *United States* v. *Beatty*, 587 F. Supp. 1325, 1331-33 (E.D.N.Y. 1984).

The government contends that, notwithstanding the actual language of § 1512, Congress meant for § 1512 to reach conduct that was not misleading to the person at whom it was directed but was intended to mislead the government. The starting point for its argument is that such conduct was previously within the ambit of 18 U.S.C. § 1510 (1976), which made unlawful "willful[ ] endeavors by means of . . . misrepresentation . . . to obstruct, delay, or prevent the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator." *See United States* v. *St. Clair*, 552 F.2d 57, 58 (2d Cir.) ("§ 1510 is violated whenever an individual induces or attempts to induce another person to make a material misrepresentation to a criminal investigator."), *cert. denied*, 433 U.S. 909

(1977); *id.* at 59 ("[S]oliciting misrepresentations by potential witnesses is illegal."); *see also* legislative history to § 1510, H.R. Rep. No. 658, 90th Cong., 1st Sess. 3, *reprinted in* 1967 U.S. Code Cong. & Ad. News 1760, 1762 ("[T]he actual procurement by a party of another party's misrepresentation or silence to a Federal investigator would be covered even though such procurement was not achieved by any misrepresentation."). The government points out that in enacting § 1512 as part of the Victim and Witness Protection Act of 1982 (the "Act"), Pub. L. No. 97-291, 96 Stat. 1248, Congress amended § 1510 to delete references to conduct consisting of "misrepresentation, intimidation, or force or threats thereof," and it argues that this deletion of "misrepresentation," etc., reflected Congress's intention that the deleted portions of former § 1510 be covered by the new § 1512. The government supports its view of Congress's intention by referring to the floor statement of Representative Rodino, Chairman of the House of Representatives' Committee on the Judiciary, in which, in a section-by-section analysis of the proposed legislation, he characterized the changes in § 1510 as "technical" and stated that the bill "delete[d] language from section 1510 pertaining to informant intimidation and retaliation because the conduct dealt with by that language is covered in new sections 1512 and 1513." 128 Cong. Rec. H8205 (daily ed. Sept. 30, 1982). We are unpersuaded.

First, the passage just quoted and relied on by the government refers only to "intimidation and retaliation," not to other forms of witness tampering. This is a thin reed on which to build a case for an interpretation of § 1512 that transforms the words "misleading conduct toward another person . . . to . . . hinder . . . [the govern-

ment]" into "any conduct leading another person to mislead the government."

More importantly, the original bill that led to the enactment of the Act contained, in addition to the eventually enacted enumeration of specific types of conduct to be reached, a catchall section designed to reach any person who "corruptly, by threats of force, or by any threatening letter of communication, intentionally influences, obstructs, or impedes or attempts to influence, obstruct, or impede the . . . enforcement and prosecution of federal law." S. 2420, 97th Cong., 2d Sess., sec. 201(a), §1512(a)(3), 128 Cong. Rec. S11,439 (daily ed. Sept. 14, 1982). The Senate Judiciary Committee opined that the prevention of obstructions of justice could not be fully carried out by a simple enumeration of the commonly prosecuted obstruction offenses and stated that the residual section was not intended to be limited by the doctrine of ejusdem generis. S. Rep. No. 532, 97th Cong., 2d Sess. 18, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2515, 2524. Thus, the Senate Report stated that the residual section was intended to reach, *inter alios*, "a person who induces another to remain silent or to give misleading information to a Federal law enforcement officer . . . irrespective of whether he employed deception, intimidation, threat, or force as to the person." *Id.* (footnote omitted). The residual section, however, was deleted from the Act as finally passed. We agree with the courts in *United States* v. *Lester* and *United States* v. *Beatty* that the legislative history of § 1512 does not suggest that Congress intended that section, as enacted, to reach modes of conduct other than those there enumerated.

Finally, we find unpersuasive the government's argument that, since King's conduct is punishable neither

under § 1510, as amended, nor under § 1503 because there was no pending judicial proceeding at the time he sought to have Orgovan give false information, *see United States* v. *Vesich*, 724 F.2d 451, 454 (5th Cir. 1984) (attempt to obstruct a criminal investigation or inquiry before a proceeding has been initiated is not within § 1503); *United States* v. *Fayer*, 573 F.2d 741, 745 (2d Cir.) ("Corrupt advice under 18 U.S.C. § 1503 must relate to an investigation by the grand jury, not the F.B.I."), *cert. denied*, 439 U.S. 831 (1978), the application of § 1512 according to its terms will allow conduct such as that proven here, *i.e.*, the nonmisleading, nonthreatening, nonintimidating attempt to have a person give false information to the government, to go unpunished. If there is such a lacuna in the legislative scheme, the proper remedy is not for the courts to distort the plain language of § 1512 but for Congress to enact legislation to close the gap.

CONCLUSION

The judgment and order of the district court are in all respects affirmed.